Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1815 and 85-1938

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

EDWARD BUNDRICK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

RODNEY ALDER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

DAVID C. SHILTON
LAURA E. FROSSARD
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' cause of action for inverse condemnation of their fee land had accrued more than six years before petitioners filed suit.

2. Whether, on the facts of this case, the United States may be equitably estopped from contending that the Secretary's 1969 order restoring certain land to tribal ownership resulted in the accrual of petitioners' cause of action for inverse condemnation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES


Cases:

| | |
|---|---|
| *Heckler* v. *Community Health Services*, 467 U.S. 51 | 12, 13 |
| *Schweiker* v. *Hansen*, 450 U.S. 785 | 13 |
| *State of Arizona* v. *Morton*, CIV No. 74-696-PHX-WDC (D. Ariz. Apr. 11, 1978) | 4 |
| *United States* v. *Dickinson*, 331 U.S. 745 | 11 |
| *United States* v. *Fuller*, 409 U.S. 488 | 8 |

Constitution and statutes:

| | |
|---|---|
| U.S. Const. Amend. V | 6, 7, 8 |
| Act of June 10, 1896, ch. 398, § 10, 29 Stat. 360 | 3 |
| Indian Reorganization Act, 25 U.S.C. (& Supp. II) 463 | 3 |
| Taylor Grazing Act, 43 U.S.C. 315 *et seq.* | 3 |
| Pub. L. No. 93-530, 88 Stat. 1711 *et seq.* | 4-5 |
| 28 U.S.C. 1346(a)(2) | 6 |
| 28 U.S.C. 1491(a)(1) | 6 |
| 28 U.S.C. 2501 | 6 |

Miscellaneous:

| | |
|---|---|
| S. Rep. 93-1234, 93d Cong., 2d Sess. (1974) | 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-1815

EDWARD BUNDRICK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

No. 85-1938

RODNEY ALDER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals in *Bundrick* v. *United States* (85-1815 Pet. App. 1-10) is reported at 785 F.2d 1009. The opinion of the court of appeals in *Alder* v. *United States* (85-1938 Pet. App. 1-11) is reported at 785 F.2d 1004. The opinion of the Claims Court in *Bundrick* (85-1815 Pet. App. 11-33) is reported at 7 Cl. Ct. 532. The opinion of the Claims

Court in *Alder* (85-1938 Pet. App. 13-26) is reported at 7 Cl. Ct. 542.

## JURISDICTION

The judgments of the court of appeals were entered on February 28, 1986. The petition for a writ of certiorari in No. 85-1815 was filed on April 30, 1986. The petition for a writ of certiorari in No. 85-1938 was filed on May 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. These cases, which were consolidated for trial and for argument in the court of appeals, are actions for inverse condemnation. Petitioners operated ranches on land that falls into three categories: (1) land owned in fee, (2) land leased from the Bureau of Land Management (BLM) and (3) land leased from the State of Arizona.[1] Title to all three categories of land is traceable to homestead patents erroneously issued by the United States between 1896 and 1934 for what was a portion of the San Carlos Indian Reservation (85-1815 Pet. App. 14-16; 85-1938 Pet. App. 14).[2] The United States has not

---

[1] The Bundricks, petitioners in No. 85-1815, own 1,913.99 acres in Pinal County, Arizona. In addition they leased 12,800 acres from the BLM and additional acreage from the State of Arizona. The Alders, petitioners in No. 85-1938, own 400.25 acres in Graham County, Arizona, of which 196.13 acres are located in the San Carlos Mineral Strip (see note 2, *infra*). They also leased lands from the BLM. The record does not indicate that the Alders leased land from the State of Arizona.

[2] In 1896, the San Carlos Apache Tribe ceded to the United States a 232,000-acre portion of the Reservation, known as the San Carlos Mineral Strip, to be "open to occupation, location, and purchase under the provisions of the mineral-land

sought to cancel the erroneously issued patents, and does not question petitioners' title to the land they own in fee (85-1815 Pet. App. 14; 85-1938 Pet. App. 15).

On March 30, 1931, the Assistant Secretary of the Interior withdrew from disposal the undisposed portion of the San Carlos Mineral Strip. That portion of the Mineral Strip was later leased by the BLM to ranchers, including petitioners, under the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Petitioners obtained grazing leases covering land in the Mineral Strip in 1953 (85-1815 Pet. App. 17) and in 1960 (85-1938 Pet. App. 14-16). The placing of the undisposed portion of the Mineral Strip under range management in accordance with the Taylor Grazing Act was only temporary until the Secretary of the Interior determined whether to restore these lands to the Tribe as provided for by the Indian Reorganization Act, 25 U.S.C. (& Supp. II) 463. See S. Rep. 93-1234, 93d Cong., 2d Sess. 2-3 (1974).

a. *Disposition of Lands Leased from the BLM.* In orders dated June 17, 1963 (relating to subsurface rights), and January 16, 1969 (surface rights), the Secretary of the Interior restored the Mineral Strip to the San Carlos Apache Tribe (Tribe) "subject to any valid existing rights" (85-1815 Pet. App. 17-18). These orders restored to the Tribe the acres that petitioners leased from the BLM, but did not affect petitioners' title to the lands they owned in fee within the Mineral Strip.

---

laws only" (Act of June 10, 1896, ch. 398, § 10, 29 Stat. 360). Despite this restriction, the United States erroneously issued homestead patents, and granted school and indemnity lands to the State of Arizona within the Mineral Strip between 1896 and 1934.

As a consequence of the 1969 order, the Bundricks' fee land was completely surrounded by tribal land, and the road leading to the Alders' fee land became tribal land. The Tribe did not prevent petitioners from travelling to and from their land, but did request persons regularly crossing tribal lands to obtain a permit from the Tribe (85-1815 Pet. App. 20-21; 85-1938 Pet. App. 17-18). Petitioners never applied for, or obtained, such permits (85-1815 Pet. App. 21; 85-1938 Pet. App. 18). With respect to lands petitioners leased, the Tribe issued grazing permits to petitioners in 1970, 1971, and 1972. In 1973, however, the Tribe notified petitioners that tribal grazing permits would no longer be issued to non-Indians, and that petitioners would have to remove their cattle when the 1972 permits expired, *i.e.*, June 30, 1973 (85-1815 Pet. App. 21-22; 85-1938 Pet. App. 17).

b. *Disposition of lands leased from the State of Arizona.* The land that the government had erroneously granted to the State of Arizona prior to 1934 (see note 2, *supra*) was the subject of litigation resolved by consent decree. *State of Arizona* v. *Morton*, CIV No. 74-696-PHX-WDC (D. Ariz. Apr. 11, 1978). Pursuant to that decree, on April 11, 1978, the United States acquired title in trust for the Tribe for all such lands within the Mineral Strip (85-1815 Pet. App. 18). The land the Bundrick petitioners previously leased from the State thus became tribal land for which grazing permits could not be obtained.[3] Without these grazing lands, petitioners discontinued their ranching operations (85-1815 Pet. App. 22-23; 85-1938 Pet. App. 17).

c. *Disposition of lands owned in fee.* On December 22, 1974, Congress enacted Pub. L. No. 93-530, 88 Stat.

---

[3] The Alder petitioners had not leased land from the State of Arizona (see note 1, *supra*).

1711 *et seq.* (the Remedial Act), directing the Secretary to purchase all privately-owned real property in the Mineral Strip, and all permanent range improvements placed on lands within the Mineral Strip formerly leased from the federal government, which had been restored to tribal ownership. Pursuant to the Remedial Act, the Secretary appraised both petitioners' fee lands and the permanent improvements built by petitioners on the land they formerly leased from the BLM. On March 24, 1978, the Secretary offered to purchase the Bundrick petitioners' fee lands and the improvements on the formerly leased lands for $250,432 (85-1815 Pet. App. 24). On January 19, 1979, after a new appraisal, the Secretary increased the offer to $256,038 (*id.* at 25). On May 12, 1978, the Secretary offered to purchase the Alder petitioners' permanent improvements on a portion of their formerly leased land for $24,455 (85-1938 Pet. App. 19); and on March 30, 1979, offered to purchase the Alders' fee lands and the permanent improvements on the remaining leased land for $116,174.98 (*ibid.*).

2. Petitioners—the only Mineral Strip landowners to do so—rejected these offers and filed suit against the United States and various federal officials in the United States District Court for the District of Arizona, seeking money damages for the taking of their fee land and leased land improvements, quiet title to the real property, and a writ of mandamus to require the defendant federal officials to comply with the Remedial Act.[4] The district court transferred the inverse condemnation claims to the Claims Court and dismissed the other claims with prejudice (Bundrick C.A. App. 61). Petitioners filed complaints in the

---

[4] The Bundrick complaint was filed on October 16, 1981; the Alder complaint on September 17, 1982.

Claims Court alleging that the United States had deprived them of the use of their property and had failed to pay just compensation as required by the Remedial Act (Bundrick C.A. App. 62-65; Alder C.A. App. 43-47).

3. After a consolidated trial the Claims Court dismissed petitioners' complaints (85-1815 Pet. App. 33; 85-1938 Pet. App. 26).

a. In *Bundrick*, the court held that petitioners did not have a property interest in the improvements on the lands leased from the BLM, and thus the government's transfer of that land to the Tribe did not create a right to compensation under the Fifth Amendment (85-1815 Pet. App. 26-27). The court further held (*id.* at 28-30) that, even if petitioners had a compensable property interest in the improvements, their claim for such compensation accrued no later than July 1, 1973; and their suit (filed on October 16, 1981) therefore was barred by the six-year limitation period of 28 U.S.C. 2501.[5]

Similarly, the court held that the statute of limitations barred the Bundrick petitioners' claim that the United States "took" their fee land by depriving them of an "enforceable legal right of access" to those lands. The court stated that any claim for inverse condemnation accrued on January 16, 1969, when the Secretary restored the federal land within the Mineral Strip to the Tribe (85-1815 Pet. App. 31-32).[6]

---

[5] The court also held that petitioners had no claim against the United States for the loss of the improvements on the land leased from the State, and that any claim petitioners might have against the State for that loss was not before the court (85-1815 Pet. App. 27-28). See 28 U.S.C. 1346(a)(2), 1491(a)(1).

[6] The Claims Court expressly stated that it did not reach the question whether the *Bundrick* complaint had stated a claim for inverse condemnation (85-1815 Pet. App. 31, 32).

The Claims Court dismissed petitioners' claim for compensation for their fee lands under the Remedial Act, relying upon the res judicata effect of the district court's dismissal of petitioners' Remedial Act claims (85-1815 Pet. App. 26).

b. In *Alder*, the Claims Court held that if the Secretary's alleged inaccurate valuation of property to be purchased under the Remedial Act created a claim for relief, that claim arose no earlier than December 1977, and thus was not time-barred (85-1938 Pet. App. 20-21). The court held, however, that petitioners failed to present any evidence that the Secretary improperly valued their land or improvements (*id.* at 22). With regard to petitioners' Fifth Amendment claims for loss of the improvements on the formerly leased land, and for deprivation of their fee land, the court held that all such claims had accrued by July 1, 1973, and were barred by the six-year limitation period (*id.* at 24-26).

4. After consolidating the cases for oral argument, the court of appeals affirmed in separate opinions. In both cases the court rejected petitioners' argument that the statute of limitations had not begun to run on their Fifth Amendment taking claims until 1977 or 1978, when the Secretary's appraisals of their property for Remedial Act compensation were completed (85-1815 Pet. App. 8-9; 85-1938 Pet. App. 7-9). The court of appeals held that by July 1973 the situation had "become stabilized" so that petitioners' causes of action for taking accrued at that time (85-1815 Pet. App. 9; 85-1938 Pet. App. 9). Thus, petitioners' taking claims, brought in 1981 and 1982, were time-barred under the six-year statute of limitations.

With regard to the Remedial Act claims, in *Alder* the court of appeals affirmed the Claims Court's hold-

ing that the Secretary had reasonably valued the property (85-1938 Pet. App. 3-6). In *Bundrick*, however, the court of appeals remanded the Remedial Act issue to the Claims Court for further consideration (85-1815 Pet. App. 5, 7, 10). The court of appeals held that the district court had not intended to dismiss petitioners' Remedial Act claims on the merits, and thus the dismissal was not res judicata (*id.* at 4-5).[7]

## ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

Despite the confusing melange of causes of action, theories of recovery and categories of land described in the petitions, these cases boil down to several simple propositions. First, with respect to the disposition of the lands leased from the BLM under the Taylor Grazing Act, petitioners have no right to compensation under the Fifth Amendment. See *United States* v. *Fuller*, 409 U.S. 488, 493-494 (1973).[8] Thus, under whatever rubric petitioners use ("taking," inverse condemnation, continuous encroachment), they have no cause of action relating to the leased property. That leaves petitioners with only a claim that they were entitled to a higher price for their fee land (and improvements on the leased land) under the Remedial Act. Neither the inverse con-

---

[7] The United States has not sought further review of this holding.

[8] Of course, as the courts below found, petitioners have no claim against the United States with respect to the grazing lands leased from the State of Arizona.

demnation issue nor the Remedial Act issue warrants this Court's review.

1. Petitioners contend that the court of appeals erred in finding that the Secretary reasonably interpreted the Remedial Act to require valuation of the fee land and improvements as of 1969 (85-1815 Pet. 29-33; 85-1939 Pet. 32-36). There is no occasion to review that question in these cases. In *Bundrick*, the Remedial Act claims are on remand to the Claims Court, so the decision below is interlocutory. And in *Alder* the judgment below rests on the alternative finding that petitioners had presented no evidence to show that the fee land or the improvements had a higher market value after January 24, 1969 (85-1938 Pet. App. 4-5).[9] Moreover, as the court of appeals noted (*id.* at 5), petitioners' argument that the Secretary should have valued the property as of 1977 is contradicted by their allegation that their property became worthless by July 1973. Thus, on the record of this case the 1969 valuation date benefited the Alder petitioners.

2. In the courts below, petitioners bundled their claims together, contending that the passage of the Remedial Act and its subsequent implementation by the Secretary were merely events in a progression of encroachments that culminated in an inverse con-

---

[9] The Alder petitioners contend (85-1938 Pet. 35 n.6) that an appraisal of the Bundrick fee land, which was higher than the Secretary's appraisal of that land, showed that the Secretary's appraisal of the Alder fee land was too low. The Bundrick fee land, a much larger ranch located in a different portion of the Mineral Strip, with different improvements and different type of access, is not comparable to the Alder fee land, and no meaningful comparison of appraisals of the two can be made.

demnation. The court of appeals correctly parsed out the components of that theory.

Because of the way the issues were framed in the lower courts, the court of appeals disposed of petitioners' inverse condemnation claims on statute of limitations grounds.[10] Without deciding whether petitioners had stated a claim for inverse condemnation (but assuming that they had (85-1815 Pet. App. 31, 32)), the court of appeals held on the particular facts of these cases that the date on which such claims accured was July 1973. By that time the actions which resulted in the alleged taking had occurred and the extent of the loss was known (*id.* at 8-10; 85-1938 Pet. App. 8-10). When the Secretary restored the federal land within the Mineral Strip to the Tribe in January 1969, petitioners were deprived of their un-

---

[10] Had petitioners contended below—as they do in this Court—that their sole remedy is under the Remedial Act (85-1815 Pet. 25-29; 85-1938 Pet. 29-32), this litigation would have been much simplified. Until now, however, petitioners have argued that the passage and implementation of the Remedial Act were merely events in a progression of encroachments that created an inverse condemnation. But the record shows that Congress enacted the Remedial Act to alleviate the hardship suffered by ranchers as a result of efforts to correct the erroneous issuance of rights to the Mineral Strip. The Act authorized the Secretary to acquire petitioners' fee lands without regard to whether the ranchers had a cause of action for that injury. Indeed, if the prior claims petitioners assert had existed, the Remedial Act would have been redundant. Accordingly, any claim that subsequently arose as a result of the Secretary's implementation of the Remedial Act with respect to fee land is, as the court of appeals correctly held, separate from whatever stale claims petitioners assert based on the 1969 restoration order's effect on leased lands.

encumbered right of access to their fee land. The remaining consequences of the January 1969 restoration order were the loss to the petitioners of their grazing leases and the improvements they had placed on the leased lands, which occurred in July 1973, when the Tribe refused to renew petitioners' leases. Thus, as of July 1973 petitioners' fee land was "landlocked," with no right of access across tribal lands, unusable for ranching operations without the adjoining leased grazing lands, not marketable or mortgageable, and the improvements affixed to the leased land could no longer be used (85-1815 Pet. App. 9; 85-1938 Pet. App. 9). There is therefore no merit to petitioners' contention (85-1815 Pet. 19-24; 85-1938 Pet. 23-28) that their alleged inverse condemnation claim had not accrued by July 1973.

Nor is there merit to petitioners' suggestion that the court of appeals misapplied this Court's decision in *United States* v. *Dickinson*, 331 U.S. 745 (1947). The Court held in *Dickinson* that a cause of action accrues when "the situation becomes stabilized" and the consequences of the encroachment "have so manifested themselves that a final account may be struck" (331 U.S. at 749). As the factual findings concurred in by both lower courts show, there was ample basis for concluding that petitioners' inverse condemnation claims were time-barred under *Dickinson*.

3. Petitioners conclude by contending (85-1815 Pet. 40-44; 85-1938 Pet. 43-47) that the government should be estopped from arguing that petitioners' loss of access to their fee land in 1969 resulted in the accrual of the inverse condemnation claim because the Secretary's 1969 restoration order stated that the order "shall not affect any patented lands located within the mineral strip." The court of appeals cor-

rectly declined to hold that the government was equitably estopped (85-1815 Pet. App. 10).

Whether or not the doctrine of equitable estoppel may ever be applied against the government, this Court made clear in *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984), that a party must show at a minimum that the government made a "definite misrepresentation of fact" while "having reason to believe that [the party] will rely upon it * * *." In this case, the Secretary's 1969 order was not a misrepresentation of fact. The order did not restore to tribal ownership any land within the Mineral Strip that was owned in fee by individuals such as petitioners on January 16, 1969.[11] The order restored to the Tribe only the federally-owned land within the Mineral Strip.

Petitioners allege that the order restoring to the Tribe the federal land surrounding their fee land began the process of inverse condemnation of their fee land by cutting off their access to that land. Even if petitioners were correct that the restoration order eventually led to the inverse condemnation of their patented land, that would not be inconsistent with the Secretary's statement that the restoration order did not itself *apply* to patented land. This is especially true since petitioners contend that their fee land was *not* taken in January 1969 (although the process of the taking allegedly began then), but was taken in 1979 when the government made its final offer to pur-

---

[11] Petitioners' discussion (85-1815 Pet. 42-43; 85-1938 Pet. 46) of the government's "misconduct" in originally issuing homestead patents within the Mineral Strip is irrelevant to the issues in this case. The government has never sought to cancel the original patents from which petitioners' titles are derived.

chase their property. Petitioners cannot have it both ways; either their fee land was taken by the restoration order and their cause of action for the taking accrued then; or their fee land was not taken by the restoration order, and the statement to that effect in the restoration order was true.

Moreover, the government cannot be equitably estopped by the statement in the restoration order because that order did not cause petitioners to act or forbear to their detriment. See *Heckler* v. *Community Health Services*, 467 U.S. at 59, 61-62; *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). Petitioners were on notice that they no longer had an enforceable right of access in January 1969, when the surrounding federal lands were restored to the Tribe, or certainly when the Tribe notified them that persons regularly crossing tribal land must obtain tribal permits (85-1815 Pet. App. 20-21; 85-1938 Pet. App. 17-18). Thus, even if the Secretary's statement erroneously described the effect of the restoration order on the patented land, the resulting loss of access was apparent, and no statement to the contrary made in 1969 prevented petitioners from bringing suit within six years thereafter. See *Schweiker* v. *Hansen*, 450 U.S. at 789. If petitioners did rely on the 1969 statement in their failure to sue for the loss of the value of their patented land, it was an unreasonable reliance because their loss of access was obvious after 1969. A party seeking to assert equitable estoppel cannot claim to have been misled by relying upon a representation if that party could have acquired knowledge of the truth by reasonable diligence. *Heckler* v. *Community Health Services*, 467 U.S. at 59-60 n.10.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

DAVID C. SHILTON
LAURA E. FROSSARD
*Attorneys*

JULY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20260